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IN THE  
SUPREME COURT OF THE  
UNITED STATES

OCTOBER TERM, 1943

NO. 776

DEALER'S TRANSPORT COMPANY,  
*Petitioner,*

*Vs.*

ESSIE MAE REESE, AS ADMINISTRATRIX OF THE  
ESTATE OF ISAAC REESE, DECEASED

DEALER'S TRANSPORT COMPANY,  
*Petitioner,*

*Vs.*

LUCY ANN REESE, AS ADMINISTRATRIX OF THE  
ESTATE OF SARAH REESE, DECEASED.

DEALER'S TRANSPORT COMPANY,  
*Petitioner,*

*Vs.*

MACK REESE.

PETITION FOR WRIT OF CERTIORARI TO THE  
UNITED STATES CIRCUIT COURT OF APPEALS.  
FIFTH CIRCUIT



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PETITION FOR WRIT OF CERTIORARI TO THE  
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FIFTH CIRCUIT

TO THE HONORABLE CHIEF JUSTICE AND ASSOCIATE  
JUSTICES OF THE SUPREME COURT OF THE UNITED  
STATES:

Petitioner seeks by writ of certiorari to review the final judgment of the United States Court of Appeals, Fifth Circuit, in the above named cause.

See report of case:

*Dealers Transport Co. vs. Reese; Clark v. same*, 138 F  
(2d) 638.

### SUMMARY STATEMENT OF THE MATTER INVOLVED:

Respondent, Essie Mae Reese, as Administratrix of the estate of Isaac Reese, deceased, on September 8th, 1942, sued petitioner and James Olan Clark in the Circuit Court of Montgomery County, State of Alabama, claiming fifteen thousand dollars as damages for the death of her intestate, Isaac Reese, averring that said death was caused by James Olan Clark, the agent, servant or employee of petitioner, by negligently running an automobile into or against the mule and wagon driven by plaintiff's intestate, it being averred that as a proximate result of the negligence complained of Isaac Reese, her intestate, was killed. (Rec. p. 15.)

A similar suit was brought on the same date and in the same court by Lucy Ann Reese, as Administratrix of the estate of Sarah Reese, deceased, claiming fifteen thousand dollars as damages for the death of her intestate, Sarah Reese, growing out of the same accident, the same acts of negligence on the part of the driver, James Olan Clark, as averred in the suit of Essie Mae Reese, Administratrix of the Estate of Isaac Reese, deceased, above referred to. (Rec. pp. 151-2.)

The third suit grew out of the same accident referred to in the two suits above named, and was brought in the same State Court, on the same date, against the same defendants, by Mack Reese, claiming fifteen thousand dollars as damages for personal injuries, it being averred that such injuries resulted from the same acts of negligence on the part of James Olan Clark.

It was averred in each of the complaints that he was the agent, servant or employee of petitioner, and acting within the line of his employment. (Rec. pp. 186-7.)

After the institution of the three suits they were regularly removed from the State Court to the District Court of the United States for the Northern Division of the Middle District of Alabama.

See Agreement of Parties: (Rec. p. 2.)

And order of removal: (Rec. pp. 20-21, 157, 191.)



After their removal and before pleading to the merits, petitioner, appearing specially for that purpose alone, filed motions to quash the service of process and abate the suits as to it in each of the three cases. (Rec. pp. 22-26-158-162, 192-196.)

The return of the sheriff in each of the cases shows that as to petitioner service of copies of the summons and complaint was had "By leaving three copies with John Brandon, Secretary of State of the State of Alabama, the true and lawful agent or Attorney for the defendant, Dealer's Transport Company." (Rec. pp. 17, 154, 188.)

In each of the three complaints it is averred that the Dealer's Transport Company was a non-resident corporation, that its general office was 100 West 91st Street, Chicago, Ill., that the motor vehicle referred to in the complaint was being operated on a public highway in the State of Alabama by the Dealer's Transport Company or the Dealer's Transport Company was the owner thereof and it was being operated by themselves, which was equivalent to an appointment by Dealer's Transport Company of the Secretary of State of the State of Alabama, or his successor in office, as its true and lawful agent or attorney upon whom service of process should be had. "Wherefore, plaintiff prays that service be had upon the said Dealer's Transport Company as made and provided for by Section 199, Title 7, of the 1940 Code."

In two of the complaints it is averred that Dealer's Transport Company was not qualified to do business in the State of Alabama and had no designated agent upon whom service of process could be had. (Tr. pp. 153, 187.)

In each motion the return of the Sheriff showing service of the summons and complaint on the Secretary of State is set out and notice given by him to petitioner of such service, with which there was forwarded to petitioner, at its address in Chicago, copies of the summons and complaints. (Tr. pp. 22-3, 158-9, 192-4.)

Briefly stated, the grounds of the motion in each case are:

(1) Defendant is a foreign corporation under the laws of the State of Illinois, with a branch office in Atlanta, Georgia.

At the time of the alleged acts of negligence it was not engaged in business in Alabama, and had not, at that time nor since then, qualified under the Constitution and Laws of Alabama to do business as a foreign corporation in that State, and had not, at that time nor since then, maintained an authorized agent or agents residing in Alabama, upon whom service could be had as authorized by Section 232 of the State Constitution, and Title 10, Section 192, Code of 1940.

(2) At the time of the acts of negligence complained of it was not personally operating the automobile, truck or motor vehicle referred to in the complaints as causing the injuries complained of.

(3) That it was not the *owner* of the automobile, truck or motor vehicle referred to as causing the damages claimed, and had never owned the same, and that the same was the property of the United States Government.

That it was not the *owner* of the motor vehicle and was not operating it as owner thereof, either personally or by agent, at the time of the injuries complained of.

On the submission of the motions it was agreed by the attorneys for the plaintiffs and defendants that the facts alleged in the motions as to the return of the Sheriff as above set forth, that this petitioner was and is a foreign corporation under the laws of the State of Illinois, that it had not qualified to do business as a foreign corporation in the State of Alabama at the time of the alleged negligence, nor since then, under the Constitution and Laws of the State of Alabama, and had not, at that time nor since then, maintained an authorized agent or agents residing in the State of Alabama, upon whom service could be had as authorized by Section 232 of the State Constitution, and Title 10, Section 192, Code 1940, were true. (Rec. pp. 26-7.)

As to Dealer's Transport Company, it was agreed in open court that the testimony taken before the Court should be used in each motion.

The facts adduced on the hearing of the motions were, in substance:

The United States Government, prior to and at the time of the accident, maintained a military supply depot called Connelly Army Depot near Atlanta, Georgia, where motor vehicles for military purposes were assembled, from which they were moved to other depots, from time to time, or to other military places for military purposes.

In May, 1942, an order was sent from the Quartermaster General's Office in Washington, D. C., to transfer five Chevrolet cargo trucks from Army Depot, Georgia, to the Quartermaster at the New Orleans Army Air Base. Col. Stewart was the Commanding Officer in charge of the supply depot in Atlanta. Dealer's Transport Company was designated to carry out the order. This Company was doing business there in Atlanta. Memorandum was issued to the officer in charge of transportation to issue bill-of-lading to cover delivery by Dealer's Transport Company of the vehicles from Army Depot, Georgia, to Quartermaster, New Orleans Army Air Base. After the memorandum for issuance of the bill-of-lading was written the five vehicles were turned over to Dealer's Transport Company for delivery to New Orleans. The trucks belonged to the United States Government and were for military purposes. The Quartermaster in New Orleans was Distribution Officer or Quartermaster of Ordnance and Military Supplies for the Organizations stationed at the New Orleans Air Base. (Miller's Testimony, pp. 28-9.)

Dealer's Transport Company was employed by the Government but the employment of the person to deliver the motor vehicles was left to Dealer's Transport Company. The Government had a contract with the Dealer's Transport Company and a Government bill-of-lading as to each particular truck. (Rec. p. 30.)

The memorandum for the issuance of the bill-of-lading was issued in the office of the Atlanta Supply Depot by Col. Stew-

art the officer in charge of the Transportation Division. (Rec. p. 30.)

The Government paid the Dealer's Transport Company for the transportation of the trucks on the Government bill-of-lading. The trucks were turned over to Dealer's Transport Company on May 27th, 1942, under the bill-of-lading. (Rec. p. 31.)

The Government bill-of-lading (Rec. 72) offered in evidence, issued to Dealer's Transport Company, has a date stamp on it, June 10th, 1942. While bearing that date, the bill-of-lading is supposed to have been issued in advance of the order and prior to the delivery of the vehicles to Dealer's Transport Company for transportation. (Rec. 31-2.)

After the trucks were delivered to Dealer's Transport Company they were turned over by the Company to its employee, J. Olan Clark, for transportation on their own power and delivery at the Air Base in New Orleans. He was the driver and actually had charge of the convoy. He was driving the truck at the time the accident happened. Dealer's Transport Company did not own the trucks and had no interest in them except to transport them. (Rec. p. 32.)

When the trucks were turned over to Clark a temporary bill-of-lading was issued by Dealer's Transport Company reciting receipt of same from Army Depot, Conley, Georgia, for delivery to the Consignee, Quartermaster, New Orleans Army Air Base, and turned over to Clark, who was named as driver. It was necessary to have this bill-of-lading to comply with the rules of the Interstate Commerce Commission and the Interstate Commerce Law. The temporary bill-of-lading was to serve in lieu of the Government bill-of-lading until that bill-of-lading was turned over to Dealer's Transport Company. (Rec. 32-3.) The Government bill of lading is set out on pp. 72, et seq. of record.

Dealer's Transport Company was carrying a great many motor vehicles for the Government through every State in the Fourth Service Unit, embracing Alabama. It had not transport-

ed or delivered through the State of Alabama, out of the depot at Atlanta, any vehicles except military trucks for military purposes for the United States Government. They had only military business in Atlanta. In using the highways to transport these vehicles for military purposes they paid no tax of any sort. The Government would not pay any tax.

Upon submission the District Court made the following order overruling the motions:

"It is therefore ordered and adjudged by the court that each of the motions to set aside and quash the service of the summons and complaint and the return of the same on each of the defendants in each of these actions be, and the same is hereby, overruled and denied, to which action of the Court each of the defendants excepts separately in each action." (Rec. p. 39-40.)

Upon overruling the motions to quash, the District Court made the following order consolidating the three actions:

"It further appearing that these actions involve common questions of law and fact, it is ordered and adjudged by the court that the three above styled actions be, and they are hereby, consolidated for a joint hearing and trial of all of the matters in issue in said actions. This 5th day of February, 1943." (Rec. p. 40.)

#### PLEADINGS:

During the trial of the cases plaintiffs amended their complaints, against the defendants' objections, by adding count 3, claiming damages for wanton injuries. In the Mack Reese case this count is set out on pages 197-8 of the record.

The pleas of petitioner in each of the cases were failure of complaint to state a claim against the defendant, Not Guilty, and in short by consent, leave to give in evidence any matter that might be specially pleaded. (Rec. pp. 43, 164, 198-9.)

These pleas were permissible under Alabama Court decisions. *Moore vs. Williamson*, 210 Ala. 427, 98 So. 201, *N. Y. Life Insurance Co. vs. Sinquefield*, 231 Ala., 185-7, 163 So. 812.

On the trial in the District Court petitioner specially contended:

1. That in the two homicide cases there could be no recovery, because:

(a) The recoveries sought were under Sec. 123, Title 7, Alabama Code of 1940, known as the Homicide Act. That the damages recoverable were not to compensate anyone, but were penal, for the purpose of meting out civil punishment to the wrong doer, thereby preventing homicides; that at the time of the accident the United States was engaged in war with Japan, Germany and Italy; that the Dealers Transport Company was a Governmental agency of the United States, whose services had been requisitioned by the United States Government for the transporting of the motor vehicles involved in the accidents, that the State of Alabama had arrested and imprisoned its employee, Clark, the driver of the motor truck, who was acting within the line and scope of his employment, and as an additional punishment was seeking through the plaintiff administrators to recover damages as civil fines for the acts complained of; that by so doing the State had impeded the war efforts and delayed the delivery of the trucks; that these acts were assertions of State sovereignty directly in conflict with the sovereignty of the United States in the exercise of the Nation's exclusive right to wage and carry on war against its enemies, and because of such conflict of the two sovereignties the suits could not be maintained, the sovereignty of the United States being supreme in such cases.

(b) That for the reasons above set out damages for wanton injuries under the wanton count were not recoverable in the Mack Reese case.

The testimony in support of these defenses is in part hereinabove set out in the evidence offered supporting the motions to quash. Other pertinent evidence is:

(a) The Government bill-of-lading showing the relations between the petitioner and the United States Government. (Rec. p. 72-8.)

(b) Order of Col. Stewart, May 26, 1942, for issue of the bill of lading.

(c) Extracts from the testimony of R. E. Miller, Clerk in Supply Depot, Atlanta, Georgia:

"We received an order from Quartermaster General in Washington to deliver these particular vehicles in New Orleans. Our office selected Dealer's Transport Company to deliver them." (Rec. p. 78.)

Also testimony of this witness, Rec. pp. 80-1.

"Accomplishment of the Government bill-of-lading was delayed, but really has effect before the shipment was made." (Rec. p. 81.)

"As far as I know, Dealer's Transport Company was not engaged in any other business than delivering army trucks and things of that sort, exclusively for the Government there in Atlanta under orders of the Quartermaster General. The best of my knowledge, that is all they were doing." (Rec. pp. 81-2.)

"Transportation of these trucks was made to the New Orleans port of embarkation—" "They were used for transportation of troops and cargo, embracing food, clothing and shelter. They were all for military purposes and supplies. They were also equipped for transporting cannon." (Rec. p. 82.)

(d) Extracts from the testimony of Edwin Reiss:

"Am Branch Superintendent of Atlanta operations of Dealer's Transport Company, Southeastern area. The Company is incorporated in Chicago. I was ordered by our Vice-President and General Manager, who had conferred with the Quartermaster General, Ghormley, to go to Atlanta and immediately start the transporting of Government vehicles in the Southeast for the United States Army. I went." (Rec. p. 100.)

"We got instructions from the Government. Then we employed a driver to drive these vehicles. We had no interest

in them other than to deliver them in obedience to the instructions we had received." (Rec. p. 110.)

"The orders we had were the ones under which we took charge - - -" "The real bills-of-lading were sometimes delayed - - maybe five or six days after we delivered the trucks. They related back to the time we took charge of the supplies to be forwarded." (Rec. p. 111.)

"We came to Atlanta for the express purpose of delivering motor trucks and other vehicles for military purposes. We never endeavored to engage in any other business." Rec. pp. 112-13.)

"The Government controlled the speed for driving the vehicles, and the care we should take of them, and, if caught speeding, the Military Police could pick up the vehicles." (Rec. pp. 113-14.)

"Our instructions by the bill-of-lading were to transfer the vehicles from Atlanta to New Orleans. This accident occurred while they were en route." (Rec. p. 114.)

The testimony of James Olan Clark shows that he was driving the truck for Dealer's Transport Company at the time of the accident; that he was continuously engaged in driving motor vehicles for Dealer's Transport Company, and that such driving and delivering of motor vehicles was for military purposes only, and for nothing else. (Rec. pp. 86-7.)

At the conclusion of the evidence offered by both parties petitioner, in each of the three cases, moved the court for a directed verdict. (Rec. pp. 117-18, 165-6-, 199-200.)

The motions were overruled and exceptions reserved by petitioner. The jury rendered verdicts in favor of the respective plaintiffs, as follows:

Essie Mae Reese, as Admx., \$10,000.00,  
Lucy Ann Reese, as Admx., \$6,500.00  
Mack Reese, \$8,500.00.



Judgments were entered in these respective cases for the amounts of damages assessed by the jury in each case. (Rec. pp. 129, 167, 201.)

Motions were made in each case by petitioner and the other defendant to set aside the verdicts and judgments, and also they further moved the court to enter judgment in favor of the defendants in accordance with their motions for directed verdicts at the close of all of the evidence in the cases. In the alternative, they moved the court for a new trial.

The motions were overruled and exceptions reserved. (Rec. pp. 129-31, 167-9, 202-3.)

The defendants, Dealer's Transport Company and James Olan Clark, took separate appeals from the judgments rendered against them.

Because of the consolidation of the suits in the District Court, the facts and evidence in each case being practically the same, to avoid duplication as far as possible and to abridge the record in the printing thereof, the parties on appeal agreed on the contents of the printed record and that the same should be printed in one book or volume. (Rec. 1-12.) The transcript of the record was printed as agreed and all the cases were docketed as one case No. 10,759. The appeals were submitted together and they were so treated and considered by the Court of Appeals. (See first page certified transcript of record.)

The cases were argued and submitted October 20, 1943, (Certified Tr. of Record 271.)

On November 12, 1943, an opinion was rendered in the Circuit Court of Appeals affirming the judgment of the lower court. (Certified Record 272-8.) On the same day, November 12, 1943, judgment in accordance with the opinion was rendered affirming the judgments of the District Court. (Certified Record 279.)

On November 29, 1943, petitioner filed its application for rehearing. (Certified Record 280-82.)

On December 15, 1943, the Court denied the application for rehearing. (Certified Rec. 291.)

Petitioner presents this petition for certiorari on March 11, 1944, within three months after denial of application for rehearing and within the time allowed by law. *Gypsy Oil Co. v. Escoe* 275 U. S. 498, 72 L. Ed. 393.

### JURISDICTION

The basis on which it is contended that this court has jurisdiction to review the judgment of the Circuit Court of Appeals here in question the statutory authority conferred upon this court under Section 240 of the Judicial Code of the United States as amended (U. S. C. A. Title 28, Sec. 347), making it competent for this Court to review by certiorari upon petition therefor, the judgment here in question and generally judgments of the Circuit Court of Appeals of the United States.

### QUESTIONS RESERVED

1. By its decision and judgment the United States Circuit Court of Appeals affirmed the judgment of the District Court in each of the cases. This decision was erroneous.

2. Petitioner was not personally operating the motor vehicle at the time of the accident resulting in injuries for which damages were claimed in the suit. It was therefore not amenable to process served upon the Secretary of State as its agent. The Circuit Court of Appeals erred in so adjudging.

3. James Olan Clark was personally operating the motor vehicle at the time of the accident resulting in the injuries for which damages were claimed. Petitioner was not the owner of the vehicle. Not being the owner, it was not amenable to process served on the Secretary of State. The Circuit Court erred in adjudging such service valid.

4. James Olan Clark was personally operating the motor vehicle at the time of the accident. Although petitioner was his principal, it was not amenable to process served on the Secretary of State. The Circuit Court of Appeals erred in adjudging the service valid.

5. Petitioner was and is a foreign corporation. At the time of the service of the summons and complaints on the Secretary of State it had no authorized agent in the State of Alabama upon whom the process could be served and it was not at the time of the service on the Secretary of State engaged in business in the State of Alabama. Such service on the Secretary of State was void. The Circuit Court of Appeals erred in adjudging it was valid.

6. The Circuit Court of Appeals erred by its decision and judgment holding in the two homicide cases that the fact that the defendant was the agent of the Federal Government carrying out its orders in the prosecution of the war was no defense to those suits.

7. The Circuit Court of Appeals erred in its judgment affirming the action of the District Court in allowing an amendment in the Mack Reese case authorizing recovery of damages for wanton injuries.

#### REASONS RELIED ON FOR ALLOWENCE OF WRIT.

1. The Circuit Court of Appeals has decided an important question on local law in a way in conflict with its plain meaning and in conflict with the weight of authority, said local law being the following provision of Sec. 199, Title 7, Alabama Code, 1940 viz:

**SERVICE ON NON-RESIDENT OPERATOR OR OWNERS OF MOTOR VEHICLES:** - - The operation by a non-resident of a motor vehicle on a public highway in this state, or the operation on a public highway in this state of a motor vehicle owned by any nonresident and being operated by such nonresident, or his, their or its agent, shall be deemed equivalent to an appointment by such nonresident of the secretary of state of the State of Alabama, or his successor in office, to be such nonresident's true and lawful agent or attorney upon whom may be served the summons and complaint in any action against such nonresident growing out of any accident or collision in which such nonresident may be

involved while operating a motor vehicle on such public highway; or in which such motor vehicle may be involved while being operated on such public highway within the State of Alabama; and such operation shall be deemed a signification of such nonresident's agreement and equivalent to an appointment by such nonresident of the secretary of state of the State of Alabama, or his successor in office, to be such nonresident's true and lawful agent or attorney upon whom may be served all lawful process in any action or proceedings against such nonresident growing out of any accident or collision in which such nonresident may be involved while operating a motor vehicle on such public highway, or in which such motor vehicle may be involved while being operated on such public highway within the State of Alabama, so that any such summons and complaint against such nonresident which is so served shall be of the same legal force and effect as if personally served within the State of Alabama.

In its judgment and decision the Circuit Court of Appeals holds that James Olan Clark, who actually operated the motor vehicle involved in the accident, the basis of the suits, was the agent of petitioner and that constructive service upon the Secretary of State as agent for petitioner was valid, petitioner being Clark's principal and a non-resident, although petitioner was not the owner of the motor vehicle operated by Clark.

(a) This decision is in conflict with the plain meaning of the statute in question in that such service under the statute can be had only on the non-resident who actually operates the vehicle, or where the person so actually operating the vehicle is the agent of the owner of the vehicle. The statute does not apply or provide for service on the Secretary of State where the non-resident principal is not the *owner* of the vehicle. In this case Dealer's Transport Company was not the owner of the vehicle. It was owned by the United States and Dealer's Transport Company was merely a Governmental Agency for the transportation of the vehicle from Atlanta, Georgia, to the Army Air Base in New Orleans.

(b) It is in conflict with the decision of the United States Circuit Court of Appeals, Ninth District, in the case of *Hartley vs. Utah Construction Company*, 106 F. (2d) 953, and *Morrow vs. Asher*, 55 F. (2d) 365.

Construing State statutes with provisions similar to the Alabama Statute, it is also in conflict with decisions of Appellate Courts of other States construing statutes similar to the Alabama Statute.

*Wallace vs. Smith*, 265 N. Y. Supp. 253, 254-6;

*O'Tier v. Sell*, 256, N. Y. S. 403;

*Flynn vs. Kramer*, 271 Mich. 500, 261 NW, 77.

(c) Petitioner is a foreign corporation. At the time of the service of the summons and complaints on the Secretary of State, it was not engaged in business in the State of Alabama, had not complied with the requirements of the State Constitution for engaging in business in that State and had no authorized agent in the State upon whom the summons and complaints could be served.

Petitioner was without the jurisdiction of the Court. The provision of Section 199, Title 7, Code 1940 supra, for the service of process, had no application to petitioner and the service upon the Secretary of State as the agent of petitioner was void. The decision of the Court of Appeals affirming the judgment of the lower court is therefore erroneous.

(d) Said decision of the Circuit Court of Appeals is in conflict with Section 1 of the Fourteenth Amendment of the Constitution of the United States, providing that no person shall be deprived of property without due process of law.

*Goldey v. Morning News*, 156 U. S. 518;

*Mechanical Appliance Co. vs. Castleman*, 215 U. S. 437, 441-2;

*James-Dickinson Farm Mortgage Co. vs. Harry*, 273 U. S. 119;

*Rosenberg Bros. & Co. v. Curtis Brown Company*, 260 U. S. 516, 67 L. Ed. 372.

It is in direct conflict with the following statement of the law in *Consolidated Textile Corporation vs. Gregory*, 289 U. S. 85, 77 L. Ed. 1047:

"In order to hold a foreign corporation not licensed to do business in a state responsible under the process of a local court the record must disclose that it was carrying on business there at the time of attempted service."

(e) Said decision is in conflict with the following provisions of Section 232 of the Constitution of the State of Alabama:

"No foreign corporation shall do any business in this state without having at least one known place of business and as an authorized agent or agents therein, and without filing with the Secretary of State a certified copy of its articles of incorporation or association. Such corporation may be sued in any county where it does business by service of process upon an agent anywhere in the state," and applicable decisions construing the same:

*Farrior vs. New England Mortgage Security Company*,  
88 Alabama, 275, 7 So. 200;

*General Motors Acceptance Corporation vs. Home Loan Company*, 218 Ala. 681;

*Ford Motor Company vs. Hall Auto Co.*, 226 Ala., 385, 387, 147 So. 603;

*St. Mary's Oil Engine Company vs. Jackson Ice & Fuel Company*, 224 Ala. 152, 138 So. 834.

At the time the summons and complaints were served on the Secretary of State as agent of petitioner, Dealer's Transport Company had not complied with the requirements of Section 232 of the Constitution of the State of Alabama. At that time it had in the State no authorized agent or agents. It had not been and was not engaged in business at the time of such service through its own authorized agents.

The above decisions hold that a foreign corporation without license to do business in the State of Alabama are not subject to suit in the State unless such corporations are actually en-

gaged in business through their own authorized agents at the time of the service of the summons and complaint.

2. At the time of the accident and the injuries for which recoveries were sought, the United States was engaged in war with Japan, Germany and Italy. The declaration of war against Japan was in December 1941 as follows:

"WHEREAS the Imperial Government of Japan has committed unprovoked acts of war against the Government and the people of the United States of America: Therefore be it

"RESOLVED, by the Senate and House of Representatives of the United States of America in Congress Assembled, That the State of War between the United States and the Imperial Government of Japan, which has thus been thrust upon the United States, is hereby formally declared; and the President is hereby authorized and directed to employ the entire naval and military forces of the United States and the resources of the Government to carry on war against the Imperial Government of Japan; and to bring the conflict to a successful termination, all of the resources of the country are hereby pledged by the Congress of the United States."

The declarations against Germany and Italy are in similar form.

At the time the following pertinent statutes of the United States relating to the transportation of troops and supplies were and are now in force:

U. S. C. A. CODE, TITLE 10, SEC. 1361, pp. 233-4:

"Control of Transportation in time of war. The President, in time of war, is empowered, through the Secretary of War, to take possession and assume control of any system or systems of transportation, or any part thereof, and to utilize the same, to the exclusion as far as may be necessary of all other traffic thereon, for the transfer or transportation of troops, war material and equipment, or for such other purposes connected with the emergency as may be needful or desirable."

U. S. C. A. TITLE 10, SECTION 1362, p. 234:

"Preference to shipments of troops, etc.—In time of war or threatened war preference and precedence shall, upon demand of the President of the United States, be given over all other traffic, for transportation of troops and material of war, and carriers shall adopt every means within their control to facilitate and expedite the military traffic."

U. S. C. A. TITLE 10, SECTION 1363, pp. 234-5:

"Control and supervision of transportation of troops, etc.—The transportation of troops, munitions of war, equipments, military property and stores through the United States, shall be under the immediate control and supervision of the Secretary of War and such agents as he may appoint."

U. S. C. A. TITLE 10, SECTION 72, p. 23:

"The Quartermaster General is charged with the storage and issue of supplies, with the transportation of the Army by land and water, including the transportation of troops and supplies by mechanical or animal means, with the furnishing of means of transportation of all classes and kinds required by the Army."

The suits in the two death cases were brought under Sec. 123, Title 7, Alabama Code 1940, known as the Homicide Act as follows:

"ACTION FOR WRONGFUL ACT, OMISSION, OR NEGLIGENCE CAUSING DEATH—A personal representative may maintain an action, and recover such damages as the jury may assess in a court of competent jurisdiction within the State of Alabama, and not elsewhere for the wrongful act, omission, or negligence of any person or persons, or corporation, his or their servants or agents, whereby the death of his testator or intestate was caused, if the testator or intestate could have maintained an action for such wrongful act, omission, or negligence if it had not caused death. Such action shall not abate by the death of the defendant, but may be revived against his personal representative; and may be



maintained, though there has not been prosecution, or conviction, or acquittal of the defendant for the wrongful act, or omission, or negligence; and the damages recovered are not subject to the payment of the debts or liabilities of the testator or intestate, but must be distributed according to the statute of distributions."

Proceedings under the above section of the Code are purely statutory. The right to sue is by virtue of the statute. There was and is no common law right to maintain such action in Alabama.

*Kennedy v. Davis*, 171 Ala. 609, 55 So. 104.

The damages recoverable are punitive of the act done. They are intended to stand as an example to deter others from the commission of homicide. The purpose is the preservation of human life, regardless of the pecuniary value of a particular life to the next of kin. The admeasurements of the recovery must be by reference to the quality of the wrongful act, the degree of culpability indicated in the commission of the act without any reference to or consideration of the loss or injury, the act may occasion the living.

*L. & N. R. R. Co. vs. Perkins*, 1 Ala. App. 376, 56 So., 105;

*L. & N. R. R. Co. vs. Tegnor*, 125 Ala. 503, 38 So. 510.

The position of the administrator in such cases is expressed in *Holt vs. Stollenwerck*, 174 Ala. 213, 216, 56 So. 912 as follows:

"He acts rather as an agent of legislative appointment for the effectuation of the legislative policy and upon recovery quasi trustee for those who stand in the relation of distributees to the estate strictly so called."

As to the two homicide cases, petitioner contends no recovery could be had because:

(a) At the time of the accident, the United States was at war with Japan, Germany and Italy. Under the statutes above cited, the Quartermaster General and his sub-ordinates had full power to requisition the services of petitioner and did req-

uisition them for the purpose of transporting for military purposes in prosecution of the war, the motor vehicles involved in the accident from the Conley Army Supply Depot near Atlanta to the Air Base in New Orleans.

(b) Petitioner received orders to transport and deliver these motor vehicles and turned the same over to its employee, James Olan Clark, for that purpose. Clark was in charge of the convoy and of the particular motor vehicle, driving it at the time of the accident. Dealer's Transport Company was a governmental agency for the purpose of delivering the motor vehicles and Clark was a sub-agent of the government acting within the line and scope of his employment and agency. The acts of the State of Alabama in imprisoning and prosecuting Clark was an exercise of State Sovereignty. Likewise the prosecution of suits by the administratrices of Isaac and Sarah Reese was an exercise of State Sovereignty growing out of the same transaction, the primary purpose of which was to punish petitioner and Clark by imposing civil fines upon them for the acts causing their deaths. These assertions of sovereignty by the State interfered with and impeded the progress of the war by reason of the prosecution and imprisonment of Clark resulting in delay of delivery of the motor vehicles and also by the actions resulting in verdicts and judgments imposing civil fines in the nature of penalties against Clark and petitioner, who at the time were agents of the government acting under the orders of the military authorities for the transportation and delivery of the motor vehicles.

To requisition the service of Dealer's Transport Company no stereotyped form of order was necessary. It might be placed under the form and terms of polite request. It is left to the discretion of the government to determine the placing of orders and how its intentions are to be communicated or by writing. They may be made known by telegram, telephone or letter. The acts of Congress do not prescribe the method of communication nor its form. *Roxford Knitting Co. v. Moore and Tierney* 265 F. 177, 188. (Decided by U. S. Circuit Court of Appeals 2nd. Circuit March 18, 1929.)

In requisitioning the services of petitioner and treating it as an agent of the Government to deliver the motor vehicles to the Air Base in New Orleans, the United States Government, acting through its duly constituted authorities, was exercising its sovereign power to wage war in pursuance of the declaration of Congress and to engage in an all out effort to win the war. Petitioner's contention is that the exercise by the state of its sovereignty in the manner above set forth was in direct conflict with the sovereign power of the United States to wage war and an unwarranted interference with the war effort and that decision of the Circuit Court of Appeals to the contrary is error.

As a further reason for granting the writ, petitioner contends:

(1) The power granted by the Constitution to the Federal Government to wage war includes the power to conduct it to a successful conclusion. The Government has plenary and exclusive power over all matters pertaining to war, with which no state or its courts can interfere, and the Congress in the protection of the common good, may enact all such legislation as in its wisdom it deems essential to the prosecution of war and may employ any means calculated to wage the war successfully.

67 C. J. Sec. 55, p. 365-6.

(2) The State has no right to hinder or embarrass the United States directly or indirectly in carrying out its power to make war and no local statute can be permitted to stand as a bar to the effective exercise of the war power by the Federal Government. War measures are the exclusive prerogative of the National Government and are not within the purview of the regulatory power of the State.

67 C. J. Sec. 61, page 372

The decision of the Circuit Court of Appeals is contrary to the above principles of law and therefore erroneous.

(3) Because of conflict between State and National Sovereignty, the decision of the Circuit Court of Appeals is con-

trary to the following principles of law announced in *Tarble's* case, 13 Wallace, 406, 407:

"Powers of the General Government and of the State, although both exist and are exercised within the same territorial limits, are yet separate and distinct sovereignties, acting separately and independently of each other, within their respective spheres. And the sphere of action appropriated to the United States, is as far beyond the reach of the judicial process issued by a state judge or a state court, as if the line of division was traced by landmarks and monuments visible to the eye."

"The two governments in each state stand in their respective spheres of action in the same independent relation to each other, except in one particular, that they would if their authority embraced distinct territories. That particular consists in the supremacy of the authority of the United States when any conflict arises between the two governments. The constitution and laws passed in pursuance of it, are declared by the constitution itself to be the supreme law of the land and the judges of every State are bound thereby, 'anything in the constitution or laws of any state to the contrary notwithstanding.'"

(4) The decision is contrary to the following principles of law announced in the cases of *Tennessee v. Davis* 100 U. S. 257, *In Re Neagle*, 135 U. S. 1, *U. S. v. Casey* 247 F. p. 367, *U. S. v. Pappas* 252 F. 55 (9th U. S. Circuit Court of Appeals):

(a) The general government has power to protect itself in exercising its constitutional powers. It can act only through its officers and agents. They must act within the states.

When acting within the scope of their authority, they are not amenable to State courts, but to Federal Courts and authority for their acts. Were it otherwise, state legislation might be unfriendly, might affix penalties to acts done under immediate direction of the national government, might deny the authority conferred by Federal law, or administer Federal law in such

manner as to paralyze the operations of the government.—  
*Tennessee v. Davis* 100 U. S. 262-3-

(b) "Were the power to conduct war and to maintain efficiency in the army dependent in any degree upon the pleasure of the states, it would in all probability be unequally exerted and the government might suffer disaster by obstruction to an adequate exercise of such power on the part of unfriendly states." *U. S. v. Casey* 247 F. p. 367.

(5) The recoveries in the two death cases were for penalties in the nature of civil punishment under the Alabama Homicide Act. They were against Petitioner and Clark its employee. At the time Petitioner was a governmental agency for carrying on the war and Clark was a sub-agent of the government. Both were acting within the scope of their agency and Clark was transporting the motor vehicle under military orders for delivery to the air base in New Orleans for military purposes, when the accident occurred. Such damages were not recoverable. The decision of the Circuit Court of Appeals holding they were recoverable was erroneous and in conflict with the following Federal and State decisions:

*Missouri Pacific R. R. Co. v. Ault*, 256 U. S. 554;

*Howard v. Davis* 209 Ala. 113; 95 So. 554;

*Heidtmueller v. L. & N. R. R. Co.* 210 Ala. 538 98 So. 792.

3. Said Circuit Court of Appeals has decided against Petitioner an important question of federal law which has not been, but should be settled by this Court, viz:

Petitioner by proper military authority was directed to transport five motor vehicles on their own power for military purposes from a military supply depot near Atlanta, Georgia, and deliver same at the Army Air base in New Orleans. Under these orders Petitioner's employee was placed in charge of the convoy and was the driver of one of the vehicles. While driving it and while acting within the scope of his agency the vehicle and driver became involved in an accident on a public highway in Alabama resulting in the death of two persons and

injury to another. There was no common law liability arising from the deaths of the two persons, but an Alabama statute authorizing in case of negligence recovery by their administrators of damages as penalties. At the time of the accident the United States was engaged in war with Japan, Germany and Italy. Petitioner insisted it was an agent of the Government transporting the vehicles under military orders for military purposes, that it was liable only to the federal government for its acts and that it was not liable for the penalties recovered under the state statute. The Circuit Court of Appeals held it was liable. This question has not been decided by this Court.

WHEREFORE, Petitioner respectfully prays that a writ of certiorari be issued out of, and under the seal of, this Honorable Court, directed to United States Circuit Court of Appeals, Fifth District, commanding that Court to certify and send to this Court for its review and determination, on a day certain to be therein named, a full and complete transcript of the record and of all proceedings of said Circuit Court of Appeals in this cause, and that upon such review this Court will reverse the judgment of the United States Circuit Court of Appeals of the Fifth Circuit and hold that the service of the summons and complaints in each of the three cases wherein petitioner was made defendant upon the Secretary of State of Alabama as agent of petitioner was invalid and of no effect, and also hold that the plaintiffs in the two homicide cases were not entitled to recover and that the plaintiff Mack Reese in his suit was not entitled to recover for wanton injuries under the facts disclosed by the record, that petitioner was entitled to a directed verdict as to the two homicide cases and that petitioner may have such other and further relief or remedies in the premises as to this Court may seem appropriate; and petitioner will ever pray, etc.

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